No. 75-708

In the Supreme Court of the United States

OCTOBER TERM, 1975

STANLEY MARKS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners claim: (1) that it was improper to charge the jury on the obscenity standards of *Miller* v. *California,* 413 U.S. 15, with respect to conduct occurring prior to that decision; (2) that a court of appeals is required independently to view the materials in order to determine whether they are obscene; and (3) that the jury was improperly instructed to apply the community standards of the district in which the trial was held.

After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioners were convicted of conspiracy to transport obscene materials in interstate commerce, in violation of 18 U.S.C. 371. Petitioners Marks, Mohney, Weir and American Amusement Company, Inc., also were convicted on seven counts of interstate transportation of obscene materials, in violation of 18 U.S.C. 1465. Petitioners Marks, Mohney, and Weir

were sentenced to concurrent terms of 90 days' imprisonment and were fined $2,000 on each count. Petitioner, American Amusement Company, Inc., was fined $2,000 on each substantive count. Each corporate petitioner was fined $5,000 on the conspiracy charge. A divided court of appeals affirmed (Pet. App. A; 520 F.2d 913).

The evidence at trial established that petitioner Mohney incorporated and owned petitioner American Amusement Company, Inc. and petitioner American News Company, Inc. Petitioner Weir was the general manager and president of American Amusement (Exhs. 26, 27, 49). Petitioner Marks ran the Cinema X Theatre in Newport, Kentucky (Tr. 434, 560). The Cinema X was owned by petitioner Mohney (Exh. 2). Petitioner Weir scheduled movies for the theater, and the booking of those movies was accomplished by American Amusement (Tr. 561-566). Employees of the theater were paid by American News (Tr. 122, 437).

The films "Deep Throat" and "Swing High," as well as a number of previews,[1] were shown at the Cinema X in February 1973. The films were supplied by American Amusement and were sent to Cinema X either from Durand, Michigan, or Clarksville, Indiana (Tr. 450, 461-462, 488-489).

The films, which were shown to the jury, often focused on the genitalia. They explicitly depicted individuals, couples, and groups engaging in sexual activities, including masturbation, fellatio, cunnilingus, sodomy, onanism, copulation, and male ejaculation. See Pet. App. A. 3.

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[1]The previews at issue here are entitled "Teenage Cowgirls," "Black on White," "A Few Bucks More," "Memories of a Madam," and "Doctor's Disciples." See Pet. App. A. 3.

Petitioners presented experts who testified that the films are not patently offensive, that they do not appeal to the prurient interest under contemporary community standards, and that they have serious artistic, literary, and scientific value (Tr. 353-355, 407-410, 745-755, 812-814, 825-835).

1. The offenses occurred prior to *Miller, supra,* but the trial took place after that decision. The jury was instructed that the materials are obscene only if they are patently offensive, appeal to the prurient interest under contemporary community standards of the Eastern District of Kentucky, and lack serious literary, artistic, political or scientific value (Tr. 882-895).

Petitioners contend that the jury should not have been allowed to apply the standards enunciated in *Miller* to conduct occurring prior to that decision. They urge that the standards of *Roth* v. *United States,* 354 U.S. 476, and *Memoirs* v. *Massachusetts,* 383 U.S. 413, should have been applied at the post-*Miller* trial of pre-*Miller* conduct.

There is a conflict among the circuits on this question. Three courts of appeals have held that the Due Process and Ex Post Facto Clauses require pre-*Miller* conduct to be assessed under the *Roth-Memoirs* standards. *United States* v. *Jacobs,* 513 F.2d 564 (C.A. 9); *United States* v. *Sherpix, Inc.,* 512 F.2d 1361 (C.A.D.C.); *United States* v. *Wasserman,* 504 F.2d 1012 (C.A. 5).[2] Although the court

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[2]In cases tried prior to *Miller,* but which were on appeal when *Miller* was decided, the First and Fifth Circuits held that convictions can stand only if the materials are obscene under both the *Miller* and the *Roth-Memoirs* tests. *United States* v. *Palladino,* 490 F.2d 499 (C.A. 1); *United States* v. *Thevis,* 484 F.2d 1149 (C.A. 5), certiorari denied, 418 U.S. 932. The court in *Palladino* remanded the case for retrial under the combined standards, while the court in *Thevis* independently judged the obscenity of the materials. Cf. *Hamling* v. *United States,* 418 U.S. 87, 101-102, 115-116.

of appeals expressly declined to follow *Jacobs* and *Wasserman*, we submit that there is no reason to resolve this conflict in the present case, since the court of appeals held that the materials here are obscene under both standards (Pet. App. A. 12, A. 15, A. 18). The films fall so squarely within the guidelines applicable both prior to and after *Miller* that petitioners could not have been prejudiced by the instructions given, even if those instructions were erroneous.[3]

Moreover, the application of *Miller* standards to pre-*Miller* conduct does not present an issue of substantial continuing importance, requiring plenary review by this Court. The conflict among the circuits will lose its significance in the relatively near future because most post-*Miller* trials of pre-*Miller* conduct already have taken place. The resolution of the conflict by this Court would have little, if any, effect on future obscenity litigation.

2. Petitioners claim (Pet. 13-18) that the court of appeals was required to view the films in order to make an independent determination that they are obscene. The court of appeals specifically found the materials to be obscene under both the *Roth-Memoirs* and the *Miller*

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[3]The only portion of the *Roth-Memoirs* criteria that could arguably be of benefit to petitioners would be the social value test. While under *Memoirs* materials could be obscene only if they were utterly without redeeming social value, *Miller* holds that materials can be obscene unless they possess serious artistic or literary value. Implicit in the opinion of the court below is the finding that the materials here are wholly without redeeming social value.

In this regard, we note that in *Miller* this Court observed that the social value test of the plurality in *Memoirs* "drastically altered" the *Roth* test, and that the *Memoirs* standard "has never commanded the adherence of more than three Justices at one time." *Miller* v. *California*, *supra*, 413 U.S. at 21-22, 24-25 (footnote omitted). See also *Hamling*, *supra*, 418 U.S. at 116-117.

tests.[4] We submit that a personal viewing of the films is not a constitutionally-necessary prerequisite to this determination.

The films here are described in considerable detail in the record by the affidavits submitted in support of the application for the search warrant (Supp. R. 4-19). The affidavits not only describe the variety of sexual acts shown in the films, but also describe the "plots" of the films and summarize the narration. The entire content of the materials here was disclosed to the court of appeals, and it is apparent that the court reviewed the descriptive affidavits (Pet. App. A. 3). Because that court was fully apprised of the content of the material, its independent determination that the films are obscene was proper.

Petitioners' reliance on *Clicque* v. *United States*, 514 F.2d 923 (C.A. 5), is misplaced. In *Clicque* the court held that, when accepting a guilty plea in an obscenity case, the district court is required to determine that the materials are obscene as part of its duty to elicit the factual

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[4]This Court has never held that courts of appeals must make an independent determination that materials are obscene, although three members of the Court have expressed that view. See *Jenkins* v. *Georgia*, 418 U.S. 153, 163-165 (Brennan, J., concurring). Cf. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 343-344. Appellate courts, however, have "the ultimate power * * * to conduct an independent review of constitutional claims when necessary." *Miller* v. *California*, *supra*, 413 U.S. at 25. In light of petitioners' assertion that the *Roth-Memoirs* standard should have been applied, it was appropriate for the court of appeals to make an independent determination that the materials are obscene under that standard. Cf. *J-R Distributors, Inc.* v. *Washington*, 418 U.S. 949, 950 (opinion of Mr. Justice White) ("Obsenity cases, like others, are not immune from the standards generally governing the exercise of our appellate jurisdiction. The Court has never indicated that plenary review is mandatory in every case dealing with the issue of obscenity.").

basis of the plea.[5] In the present case the jury found the films to be obscene, and the court of appeals independently reached that conclusion. *Clicque* and the remaining cases cited by petitioners require no more. The independent appellate review to which petitioners claim they are entitled has been provided.

3. Petitioners claim that the trial court erred by instructing the jury that the community from which to draw contemporary community standards was the location of the trial, the Eastern District of Kentucky. They urge that the standards of Cincinnati, Ohio, also should have been included because the jury was drawn from the nearby Covington, Kentucky, area and because some members of the jury were employed in Cincinnati (Pet. 19-20, 23-24).

The purpose of the community standards formulation, however, is to provide an understandable guideline by which the jury may judge allegedly obscene material. *Hamling* v. *United States, supra,* 418 U.S. at 107; *Miller* v. *California, supra,* 413 U.S. at 33. The instructions here provided that guideline. The films were received and shown in the Eastern District of Kentucky, and the jury was drawn from that district. The instructions defining the Eastern District as the relevant community were therefore proper. *Hamling* v. *United States, supra,* 418 U.S. at 105-106.[6]

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[5]The defendant in *Clicque* pleaded guilty to a charge of mailing an obscene letter. The letter was not described in the indictment, nor were its contents made known to the district court at the time of the plea.

[6]We note that petitioners were allowed to present evidence of standards prevailing in Cincinnati (Tr. 320-330, 342-343, 813, 822). See *Hamling* v. *United States, supra,* 418 U.S. at 106.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.